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17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA
 19 OAKLAND DIVISION

20 IN RE ONLINE DVD RENTAL
 21 ANTITRUST LITIGATION

Master File No. M:09-CV-2029 PJH

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Hon. Phyllis J. Hamilton

23 This document relates to:
 24 ALL ACTIONS

NOTICE OF MOTION AND PLAINTIFFS'
 MOTION FOR CLASS CERTIFICATION;
 MEMORANDUM IN SUPPORT THEREOF

Date: September 1, 2010

Time: 9:00 a.m.

Judge: Hon. Phyllis J. Hamilton

Courtroom: 3, 3rd Floor

28 **REDACTED VERSION**

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on September 1, 2010, at 9:00 a.m., before the Honorable Phyllis J. Hamilton, Courtroom 3, United States District Court, Northern District of California, 1301 Clay Street, Oakland, California, Plaintiffs Andrea Resnick, Amy Latham, Bryan Eastman, Melanie Miscioscia Salvi, Stan MaGee, Michael Orozco, Liza Sivek, and Michael Wiener will, and hereby do, move the Court, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for an Order certifying a Plaintiff Class defined as follows:

Any person or entity in the United States that paid a subscription fee to Netflix on or after May 19, 2005 up to and including the date of class certification.

Excluded from the Class are government entities, Defendants, their co-conspirators, Reed Hastings, John Fleming, Defendants' subsidiaries, corporate affiliates, and counsel in this action. Also excluded are persons who subscribed to Wal-Mart DVD Rentals as of May 19, 2005. Also excluded are the Judge presiding over this action, her law clerks, her spouse, and any person within the third degree of relationship living in the Judge's household and the spouse of such a person.

This Motion is based upon this Notice of Motion and Motion, Plaintiffs' Memorandum of Points and Authorities, the Expert Report of Dr. John C. Beyer, the Declaration of Peter A. Barile III, the pleadings and other documents and testimony on file, and other written or oral arguments as may be presented to the Court.

STATEMENT OF ISSUES TO BE DECIDED

The issues to be decided are: (1) whether the Court should certify this action as a class action and (2) whether the Court should confirm the appointments of lead counsel, liaison counsel and the steering committee.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is an example of an antitrust conspiracy case for which class certification is especially appropriate. Plaintiffs are direct purchasers of online DVD rental subscriptions from Defendant Netflix. Plaintiffs allege violations of Sections 1 and 2 of the Sherman Antitrust Act and will prove on a class-wide basis that Netflix and the two Wal-Mart defendants (collectively, "Wal-Mart"), who had

1 been competitors in the online DVD rental market, conspired to allocate markets. Wal-Mart agreed to,
 2 and did, exit the online DVD rental market and Netflix agreed not to sell, and did not sell, new DVDs.
 3 Netflix subscribers paid artificially higher monthly subscription fees than they would have paid as a
 4 direct result of the conspiracy.

5 Plaintiffs readily meet the requirements of Rule 23(a). The class – consisting of millions of
 6 members – satisfies the numerosity requirement. There are many common issues, including the
 7 formation and terms of the conspiracy and its effect on Netflix's prices. The claims of the class
 8 representatives, which focus on the Defendants' conduct, are typical of those of the entire class. The
 9 class will be adequately represented: the class representatives face no conflicts and counsel will
 10 continue to vigorously pursue this litigation.

11 With respect to the requirements of Rule 23(b)(3), common issues predominate over issues, if
 12 any, affecting only individual class members. Proof of the conspiracy between Netflix and Wal-Mart
 13 will be common to all class members. The conspiracy's impact on Netflix's pricing, as a result of the
 14 loss of competition from Wal-Mart, will be measured with common evidence, not individualized
 15 evidence. That evidence will include the following class-wide facts: The conspiratorial
 16 communications between Netflix and Wal-Mart began at a time of rapid price reductions resulting
 17 from the recent arrival of a third competitor, Blockbuster. Netflix's purpose in instigating the
 18 conspiracy was to avoid further price reductions, which it would have been forced to make, had three-
 19 firm competition continued. Wal-Mart had ambitious expansion plans at the time the conspiratorial
 20 communications began. Netflix predicted that Wal-Mart's departure would cause a rise in profits, and
 21 that is what happened. The nature of this market assures that a loss of competition from one of only
 22 three firms would and did affect prices. There has been no entry by any new online DVD rental
 23 businesses since Wal-Mart's exit; competition is based on price; and the products are highly similar.

24 Netflix's standardized pricing assures that, had the price of its plans been lower, all class
 25 members would have paid less. [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

A class action is not only the superior means for resolving these claims, it is the only means. The Netflix subscribers' individual claims are far too small to prosecute a complex antitrust case against these large defendants on a non-class basis.

II. BACKGROUND

A. The Online DVD Rental Market

The online DVD rental market consists of those firms that rent DVDs online by subscription for delivery by mail in the United States. From August 2004 to May 2005, there were three major online DVD rental providers—Blockbuster, Netflix, and Wal-Mart.¹ As a result of the conduct alleged herein, which began in October 2004, the market was reduced to just two firms: Netflix and Blockbuster, a situation which has continued to the present.

Like other online DVD rental firms, Netflix charges a monthly fee based on how many DVDs subscribers wish to rent. Plans that allow more rentals have higher monthly fees.

(Barile Decl. Ex. 1, at 287-88.)²

(*Id.* at 37, 53-54.)

B. Defendants' Illegal Market Allocation Agreement

As of August 2004, Netflix and Wal-Mart were the only meaningful competitors in this market. Netflix charged \$21.99 for its most popular plan, the 3-out plan. On August 11, 2004, a third competitor – Blockbuster – entered the market with a price of \$19.99 for its 3-out plan. On October

¹ Walmart.com was the entity immediately responsible for the Wal-Mart Online DVD Rentals Service. Its parent, Wal-Mart Stores, Inc., is a co-conspirator. For purposes of this Motion, the distinction between the two Wal-Mart entities is immaterial. Any issues regarding the role of the parent entity and its relationship to Walmart.com will be class-wide in nature.

² Citations to Barile Decl. Ex. 1 refer to Exhibit 1 attached to the Declaration of Peter A. Barile III, submitted herewith, and to which all Exhibits referenced herein are attached.

1 14, 2004, Netflix responded to the increased competition by dropping its price to \$17.99. (Barile Decl.
 2 Ex. 2, at 0710.) The next day Netflix's stock dropped by 40% and its CEO, Reed Hastings, attributed
 3 the price cut to strong competition, including from Blockbuster and Wal-Mart, whom he identified as
 4 "major competitors." (*Id.* at 0709.) That same day Blockbuster reduced its 3-out price to \$17.49.

5 Facing the threat of further price reductions, Netflix reacted quickly to reduce or eliminate
 6 competition. Not even waiting until the next business day, Hastings contacted John Fleming, the CEO
 7 of Walmart.com. (Barile Decl. Ex. 3, at 0121-22.) The two CEOs met later in October 2004. (Barile
 8 Decl. Ex. 4, at 1569.) The communications continued over the next several months. (*Id.*; Barile Decl.
 9 Ex. 5, at 0123.) By March 17, 2005, Netflix and Wal-Mart had reached a [REDACTED] on the
 10 Market Allocation Agreement.³ (Barile Decl. Ex. 6, at 8042; Barile Decl. Ex. 1, at 280.) The process
 11 of documenting the public aspects of the deal continued through April 2005, and a joint press release
 12 announcing Wal-Mart's exit was issued on May 19, 2005. (CAC ¶ 53; Barile Decl. Ex. 7, at 0004.)

13 From their beginning on October 17, 2004, the discussions initiated by Netflix sought to have
 14 Wal-Mart exit the online DVD rental market. From Netflix's perspective, Wal-Mart's exit was not
 15 only the central goal of the discussions; Wal-Mart's agreement to promote Netflix to Wal-Mart's
 16 customers across all plans only made sense if Wal-Mart was agreeing to exit this market. (Barile Decl.
 17 Ex. 8, at 4818; Barile Decl. Ex. 1, at 247.) Wal-Mart would hardly tell its own customers to use
 18 Netflix if Wal-Mart was staying in the online DVD rental market and providing a competing rental
 19 service. (CAC, ¶ 57-58; Barile Decl. Ex. 9, at 1402.)

20 For its part, Netflix agreed not to enter the market for the sale of new DVD sales. Netflix had
 21 seriously considered new DVD sales as an additional revenue stream at least as late as December 2004.
 22 (Barile Decl. Ex. 10, at 5901; Barile Decl. Ex. 3, at 0122.) It was at Netflix's suggestion that Wal-

23
 24
 25
 26 ³ The phrase "Market Allocation Agreement" refers to the entirety of the conspiratorial agreement
 27 between Netflix and Wal-Mart, not merely the formal document that was announced on May 19, 2005.
 28 The conspiratorial Agreement apparently was reached more than two months earlier, on March 17,
 2005.

1 Mart agreed to exit the online DVD rental market in exchange for Netflix's promotion of Wal-Mart's
2 new DVD sales. (Barile Decl. Ex. 1, at 277; Barile Decl. Ex. 11, at 2710.)

3 C. Wal-Mart's Competitive Significance

4 When Netflix initiated discussions in the Fall of 2004, leading to the Market Allocation
5 Agreement, Wal-Mart was planning to expand its online DVD rental business. In November 2004,
6 Wal-Mart declared that its outlook for 2005 for DVD rentals was to [REDACTED]
7 [REDACTED] (Barile Decl. Ex. 12, at 1702.) Its CEO, John Fleming,
8 told CNBC on January 7, 2005 that the DVD rental business was among the company's "very good
9 businesses" which it was "focused on developing over the next year or two." (Barile Decl. Ex. 13, at
10 941.) Another senior Walmart.com executive stated that this was "a viable business for us, with
11 growth potential" and that Wal-Mart planned to add more distribution facilities. (Barile Decl. Ex. 14,
12 at 2793.) In its Fiscal Year 2005 planning, Wal-Mart listed DVD rentals as a "[REDACTED]" of its
13 business. (Barile Decl. Ex. 15, at 5605.) [REDACTED]
14 (*Id.*) [REDACTED] (*Id.* at 5623.)

15 This optimism was shared by Walmart.com's parent, the world's largest corporation. During
16 the Fall of 2004, Wal-Mart Stores' CEO H. Lee Scott stated that the DVD rental business had
17 "[REDACTED]"
18 (Barile Decl. Ex. 16, at 2262.) Scott also stated that in 2005, Wal-Mart would "[REDACTED]"
19 [REDACTED] and
20 that Wal-Mart "[REDACTED]"
21 [REDACTED] (*Id.* at 2262-63.)

22 D. The Price Effects Of The Transition To Three-Firm Competition

23 From the time Wal-Mart launched its online DVD rental service in June 2003, until June 2004,
24 Wal-Mart's and Netflix's prices remained stable, with their 3-out plans at \$18.76 and \$19.99,
25 respectively. Shortly after hearing that Blockbuster would soon launch a competing online service,
26 however, Netflix raised the price of its 3-out plan as of June 15, 2004 from \$19.99 to \$21.99 per
27 month, [REDACTED] (Barile Decl.
28